1-1989

Quantum Meruit and Building Contracts: Part I The Quantum Meruit Concept

Howard HUNTER
Singapore Management University, howardhunter@smu.edu.sg

J. W. CARTER

Published in Journal of Contract Law, 1989, Vol. 2, Issue 2, pp. 95-114.

Quantum Meruit and Building Contracts*

H O Hunter and J W Carter

PART I—THE QUANTUM MERUIT CONCEPT

Introduction

The aim of this article is to discuss the restitutionary principles applicable to quantum meruit claims in building contracts. In the first part we consider the concept itself and identify the contexts in which such a claim is pursued. In the second part of the article, to be published in the next issue of the *JCL*, attention is directed, principally, to one issue, namely whether the contract price constitutes a ceiling on the amount recoverable under a quantum meruit claim following breach by the defendant.

Prior to the sixteenth century, English law did not provide a remedy for a party who rendered services for the benefit of another party unless the parties had agreed to a sum in advance. This was true even though the circumstances suggested a presumption of payment.[1] In the seventeenth century, however, a type of assumpsit known as 'quantum meruit' developed to allow recovery in many such situations. By allowing the recovery of 'so much as he deserves' the action, with its close relation 'quantum valebat' (or 'quantum valebant'), led to the recovery of reasonable sums for the value of services rendered or goods supplied. Thus, for example, a builder could recover a reasonable sum for work done even though there was no agreement on price. The seventeenth and eighteenth centuries then saw the evolution and development of that branch of the law known as 'quasi-contract'.[2] Allocated to it were those causes of action, recognised by the common law, which were neither contractual nor tortious, including the action for quantum meruit.

In *Moses v Macferlan*[3] Lord Mansfield expressed the basis for the action by stating that the defendant 'in the circumstances of the case, is obliged by the ties of natural justice and equity' to pay the plaintiff. The law was, or became, much more technical than Mansfield's comment indicated. Implied contract was the theory of quasi-contract which appealed to the English judges in the nineteenth century, and liability was therefore based on an implied promise to pay the sum which the plaintiff ultimately recovered. The notion of implied promise contained an ambiguity which, whilst perhaps giving the law an element of flexibility, has hindered the development of the modern

---

* This article is a revised version of a two part seminar staged by the Committee for Postgraduate Studies (Faculty of Law, University of Sydney) in 1988. The authors are grateful to Ms Anne Duffield for researching various aspects of the article. We are also grateful to Ms Carolyn Needham, barrister and Mr Terry Burke, solicitor, for their comments at the seminar.

1 C H S Fifoot, *History and Sources of the Common Law*, 1949, p 360.

2 Compare A W B Simpson, *A History of the Common Law of Contract*, 1975, p 489.

3 (1760) 2 Burr 1005; 97 ER 676.

law. Was the promise implied in the sense that it was the subject of a genuine, though tacit agreement, or was it implied in the sense that it arose independently of the intentions of the parties?[4] In other words, was the promise implied in fact or merely imposed? The search for a comprehensive answer to this question was rendered impossible by a legal fiction, namely that even in cases where there was no tacit agreement, the basis of liability was an implied contract.

Part and parcel of the development of the law of quasi-contract was the invention of the 'common counts'. There were a number of these, but the relevant one is the count for 'work done'. By the end of the seventeenth century it was sufficient pleading for the plaintiff to declare that the defendant was indebted to the plaintiff in so much money for work and labour done and performed at the request of the defendant. Within the 'framework', to use Fifoot's[5] word, of indebitatus assumpsit a series of simple forms of pleading evolved to accommodate a variety of claims which were very commonly brought to recover liquidated sums. They survived in England until the Common Law Procedure Act 1852 (UK). The reason for their demise was the practice of invoking large numbers of these counts in a single action when the pleader was not prepared to select the right one. Telling the same tale in a number of slightly different ways was thought to be the safest way of ensuring success. No doubt certain fact situations were ambiguous, and difficulty could be perceived in deciding whether a builder should proceed on a count for work done rather than for goods supplied, but the indiscriminate pleading led to the publication of New Rules of Pleading in the Hilary Term of 1834 that confined the plaintiff to a single count. The new rules proved to be disastrous, because they led to constant nonsuits.

The Act of 1852 abolished special pleading and the common counts, but the terminology of the common counts and quantum meruit continued to be employed. The law of quasi-contract developed, but slowly, and the law of restitution emerged. Whether we can truly say that there is a law of restitution today is to some an open question. However, this article proceeds on what now appears to be the generally accepted view today: that a subject called restitution exists and that it contains the law of quasi-contract and a collection of other common law and equitable bases of liability. What is debatable is whether there exists a unifying element in the law. Although the debate here is much broader than the subject envisaged by this article, we can examine whether a unifying element exists in the specific area of quantum meruit in building contracts.

Examination of building contracts involves a discussion of the availability of quantum meruit as a legitimate claim for services rendered. Professor Birks has stated[6] the requirements of quantum meruit in cases where a contract analysis fails: (a) the recipient must have requested or acquiesced in the

---

4 See C H S Fifoot, *History and Sources of the Common Law*, 1949, p 367. American courts have tried to deal with this problem by distinguishing between 'implied-in-fact' contracts and 'implied-in-law' contracts. The former are based on the parties' actions. The promise is implied because the parties acted as if there was a promise even if there had not been any explicit promise. An implied in law contract develops from principles of justice.

5 C H S Fifoot, *History and Sources of the Common Law*, 1949, p 368.

6 Peter Birks, 'Restitution for Services', [1974] *CLP* 12 at 30.

doing of the work; (b) the recipient must have known that the work was not intended to be gratuitous; and (c) the events which have happened must not be events whose risks were borne by the plaintiff. Professor Jones' requirements are superficially simpler. In his view[7] a defendant who has been 'unjustly enriched' by benefits obtained at the plaintiff's expense must pay for them. The decision in *Pavey & Matthews Pty Ltd v Paul*[8] is important because of the prominence given to unjust enrichment as a restitutionary concept. There Deane J described[9] unjust enrichment as a 'unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case'. The question which we can also explore is the extent to which the concept, and the decision in *Pavey* itself, requires or justifies a re-evaluation of quantum meruit situations.

Analysis and Assumptions

A current analysis must begin with *Pavey & Matthews Pty Ltd v Paul*. It has implications for four types of claims likely to be made in building contract cases: (1) contracts which fail to materialise; (2) ineffective contracts; (3) contracts discharged for breach or repudiation; and (4) frustrated contracts.

There are certain assumptions that restrict our analysis in this paper. First, if there is a contract between the parties it will be assumed that there is some feature that makes it impossible for the builder to claim on the contract. Accordingly, this paper is not concerned with contractual quantum meruit claims that arise because the parties by their contract stipulated that a reasonable sum would be paid for the work done. This excludes 'cost plus' contracts which have been performed by the builder, and most situations in which the builder makes a claim for extras agreed to by the customer. Secondly, it is assumed that the builder has not done the work in question officiously. That is to say we will only be concerned with cases in which the builder has been requested to do the work or it has been assumed that work would be done.

Pavey v Matthews

In *Pavey & Matthews Pty Ltd v Paul* the appellant (the builder) had sued to recover a sum of $26,945.50 which was alleged to be due under a building contract. The claim could not be framed in contract, and was not so framed, due to noncompliance with s 45 of the Builders Licensing Act 1971 (NSW). The claim was in fact in the nature of a quantum meruit to recover the reasonable value of the work, assessed by deducting $36,000 paid from the market value, namely $62,945.50. The work had been requested by the

---

7 See Gareth Jones, 'Restitutionary Claims for Services Rendered', (1977) 93 *LQR* 273.

8 (1987) 162 CLR 221. See Gareth Jones, 'Restitution: Unjust Enrichment as a Unifying Concept in Australia?', (1988) 1 *JCL* 8; David Ibbetson, 'Implied Contracts and Restitution: History in the High Court of Australia', (1988) 8 *Oxford J Legal Stud* 312.

9 (1987) 162 CLR 221 at 256–7.

respondent (Ms Paul), and it was to be done under an oral contract to pay a reasonable remuneration, calculated by reference to prevailing rates in the industry. But s 45 required the contract to be written. It provided that a contract under which the holder of a licence undertakes to carry out (or vary) any building work is 'not enforceable against the other party to the contract unless the contract is in writing signed by each of the parties'. The appellant held a licence, and the work was 'building work' under the Act and so s 45 applied. So much was agreed by the parties who consented to Enderby J making an order for the trial (as a preliminary issue) of whether s 45 defeated the claim. Clarke J held in favour of the builder and ordered the remaining issues to be tried before an arbitrator. That decision was reversed by the Court of Appeal which held[10] that the quantum meruit, framed as an indebitatus count, was an action to enforce the contract.[11] It was also said to be inconsistent with the legislative policy of the Builders Licensing Act 1971 for the claim to succeed. An appeal was then taken to the High Court which held, by a majority of four to one (Brennan J dissenting) that the Court of Appeal was wrong.[12]

Two questions arose in the High Court. First, was the action brought an action on the contract? If this was the position the claim had to fail because s 45 rendered the contract between the parties unenforceable. If not then a second question would arise, viz, was the scope of s 45, or the policy behind the provision, inconsistent with the maintenance of the claim? Much of the discussion in the case is historical, and answers the first question by considering the nature of the quantum meruit and the indebitatus assumpsit proceeding. In large part this results from the manner in which the Court of Appeal handled the case. However, it does give the case a rather odd emphasis. Given the nature of the proceedings, and the abolition of forms of action, one would have expected a much more direct analysis of the scope of s 45. In dealing with the second question the High Court draws a distinction between legislation derived from the Statute of Frauds 1677 (Imp) and legislation such as was considered by the Supreme Court of New South Wales in *Deposit & Investment Ltd v Kaye*[13]—the Money-lenders and Infant Loans Act 1941 (NSW). If the Builders Licensing Act were analogous to the former the action would succeed, aliter if s 45 were analogous to the latter.

Mason and Wilson JJ[14] expressed the distinction between the two types of legislation, alluded to above, by posing two possible meanings for 'enforceable' and 'unenforceable'. The reference, they said, may be 'either to the judicial or curial remedies for the enforcement of a contract, including such remedies as the contract may provide'. They thought the words of s 45 apt to embrace indirect as well as direct enforcement of the contract, but pointed out that the question remained whether the action brought was an indirect enforcement of the contract. They then expressed their agreement with Deane J that the right to recover on the quantum meruit did not depend on the existence of an implied contract. Moreover, it was not enough for the appellant to prove execution

10 See *Paul v Pavey & Matthews Pty Ltd* (1985) 3 NSWLR 114.
11 The same views were expressed in *Schwarstein v Watson* (1985) 3 NSWLR 134.
12 Effectively *Schwarstein v Watson* (1985) 3 NSWLR 134 is also overruled.
13 (1962) 63 SR (NSW) 453.
14 (1987) 162 CLR 221 at 226–7.

of the building contract and non-payment. For the quantum meruit to succeed there must be acceptance of the work. The obligation so enforced 'differs in character'[15] from the contractual obligation which would have been enforceable in the event of compliance with s 45.

So far as policy was concerned, Mason and Wilson JJ thought the interpretation contended for by the respondent so 'draconian' that they were reluctant to hold that such was the intention of the legislature. Finding no genuine guidance from the terms of the Act, Mason and Wilson JJ turned to a Queensland decision, *Gino D'Alessandro Constructions Pty Ltd v Powis* at that time unreported, but since reported.[16] The court said that the purpose of broadly similar legislation in that State was the introduction of a degree of precision often lacking in such contracts, but necessary for the determination of whether loss or damage has been suffered so as to attract the benefit of insurance under the Act.

Deane J delivered the main judgment. He began by pointing out that if the respondent (and Court of Appeal) was correct a builder who discharged all the contractual obligations would be able to recover nothing if, even though quite innocent of any evil intent, the builder had failed to ensure satisfaction of s 45. His Honour also noted the oppression which would or might follow from the ability of the customer to enforce even an oral contract against the builder. He was not convinced that this was intended to be the position.

Deane J approved Jordan CJ's statement of the law of quasi-contract in *Horton v Jones (No 1)*.[17] Jordan CJ had said:

> (1) The fact that consideration is executed is not enough to render the Statute of Frauds inapplicable.
> (2) The statute will not apply where benefits flowing from acts in performance of a contract are accepted. That is to say, if the recipient has behaved in relation to them in such a way that in the absence of a contract the supplier could sue upon the common money counts. The statute would not preclude prosecution of an indebitatus claim to obtain reasonable remuneration.
> (3) Although unenforceable, the express contract prevents the implication of a new contract, in respect of which special assumpsit could be maintained. Consequently, at best the unenforceable contract can be referred to as evidence of the remuneration recoverable under an indebitatus claim.
> (4) Debt is available, in the form of indebitatus assumpsit, to obtain reasonable remuneration.

These propositions show that Jordan CJ regarded the claim in indebitatus assumpsit as independent of any genuine agreement upon which a special count could be framed. The obligation to pay, Jordan CJ, Rogers and Owen JJ explained in *Horton v Jones (No 2)*,[18] is 'imposed by law, and does not depend on an inference of an implied promise'. This meant, Deane J went on to explain, that there was no need to resort to the fictional promise of assumpsit to explain why the Statute of Frauds did not preclude the action to recover reasonable remuneration as a liquidated sum.

---

15 (1987) 162 CLR 221 at 228.
16 [1987] 2 Qd R 40.
17 (1934) 34 SR (NSW) 359 at 367–8 (approved *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221 at 246).
18 (1939) 39 SR (NSW) 305 at 320.

It was also necessary to consider certain views of Lord Denning, expressed extra-judicially[19] and judicially.[20] His views were, Deane J said,[21] subject to three criticisms. First, the obligation enforced arises independently of and is not derived from the unenforceable agreement. Secondly, the fictional assumpsit could not alter the reality that an action on an indebitatus count could be brought on the agreement, even though the pleader chose to enforce the fictional promise to pay rather than the debt. Thirdly, under the modern law, the basis of the obligation to make payment for an executed consideration given and received under an unenforceable contract is restitution or unjust enrichment.

His Honour went on to explain why, under the traditional approach Jordan CJ was correct in *Horton v Jones*. The old common indebitatus count was used to accommodate two distinct categories of claim:

> (1) to recover a debt arising under a genuine contract whether:
> (a) express or
> (b) implied; and
> (2) to recover a debt owing in circumstances where the law itself imposed or imputed an obligation or promise to make compensation for a benefit accepted.

In (1) the action is on the contract, and this was so whether it took the form of a 'special' or a 'common' count. On the other hand, in (2), although common lawyers have tended to speak in terms of an implied contract, the action is not based on a genuine agreement at all. Accordingly, a valid and enforceable agreement would preclude such a claim. So, (2) is available where there is no applicable genuine agreement or where the agreement is frustrated, avoided or unenforceable. Indeed, as Deane J pointed out,[22] it is the absence of a genuine agreement or the fact that it is not applicable, frustrated, avoided or unenforceable 'that provides the occasion for (and part of the circumstances giving rise to) the imposition by law of the obligation to make restitution'. Because the claim made in the context of the Statute of Frauds belongs in (2) it is maintainable and not regarded as an action on the contract. He agreed with Denning LJ's revised judgment in *James v Thomas H Kent & Co Ltd*.[23]

On the legislative intent, Deane J thought it important that the Act did not render the contract void or illegal. He could find no intention to deprive the builder of the ordinary common law right. Moreover, the builder was not as of right entitled to recover what the customer had agreed to pay. The right was to recover fair and reasonable restitution for the benefit of the work actually done, and which had been accepted.

Deane J also expressed some views on calculation of the payment. He said that the contract may be referred to and hinted that it might[24] be regarded as the limit of recovery. However, it is also legitimate to have regard to any

---

19 A T Denning, 'Quantum Meruit and the Statute of Frauds' (1925) 41 *LQR* 79 at 85 (see also 'Quantum Meruit: The Case of *Craven-Ellis v Canons Ltd*, (1939) 55 *LQR* 54). See further, below, text at n 27.

20 *James v Thomas H Kent & Co Ltd* [1950] 2 All ER 1009 (approved *Turner v Bladin* (1951) 82 CLR 463).

21 (1987) 162 CLR 221 at 253-5.

22 (1987) 162 CLR 221 at 256.

23 [1951] 1 KB 551 at 556.

24 (1987) 162 CLR 221 at 257.

detriment sustained by reason of the builder's failure to comply with the Act.[25]

Dawson J's judgment is much shorter, and more traditional in approach. Briefly, he reasoned as follows. First, assumpsit was delictual in nature and when used as an alternative to debt, the basic notion was a promise to pay. Secondly, this promise was not that contained in the agreement, but was rather a separate and subsequent promise to pay. Thirdly, debt was not an action to enforce payment pursuant to a contract: it was more in the nature of a 'real' action. Fourthly, later, when the promise to pay came to be implied or inferred from the circumstances, the form known as indebitatus assumpsit came to supplant debt, and was distinguishable from the other form of assumpsit in which the action was for breach of the promise. Fifthly, the common indebitatus counts, such as quantum meruit, offered a remedy where there was an express agreement which could not be enforced, provided that the agreement was completely executed or performed so that the promise to pay (a non-contractual promise) could be implied. Sixthly, these common counts rested on a promise implied in fact, rather than a fictitious promise, and were distinguishable from those cases in which indebitatus assumpsit was held to lie as a remedy in quasi-contract based on a promise implied in law to prevent unjust enrichment. Seventhly, it followed that the action on a quantum meruit was not an action on an implied contract, or at least not on an implied contract covering the same ground as the express contract. Therefore, disagreeing with Mason and Wilson JJ and Deane J, he considered *Turner v Bladin*,[26] and Denning LJ's original views in *James v Kent*,[27] to be correct. Finally, he could find nothing in the legislation at issue to preclude the action and agreed with Mason and Wilson JJ.

To conclude this lengthy analysis we turn to Brennan J's dissenting judgment. He saw a plaintiff who has fully performed as being faced with the choice of recovering the agreed sum by action on the contract or to recover the debt arising on performance. The action for damages—in its original indebitatus form—was based on a subsequent and separate promise to pay. Judgment in debt led to recovery of the precise amount of the debt. These actions were not founded on the contract. The Statute of Frauds did not preclude the indebitatus claim when based on the fictional promise to pay the debt. However, Brennan J thought that a quasi-contractual obligation to pay could not be implied in respect of a subsisting unwritten contract within the Statute of Frauds. Only if execution of the contract gave rise to a debt could the plaintiff recover—he or she could in former times sue in debt, or in an action of indebitatus assumpsit. He took the view, however, that s 45 was not analogous to the Statute of Frauds. The contract was rendered unenforceable and an unenforceable contract 'cannot give rise to any legal remedy, whether curial or extra-curial'.[28] It was thus

---

25 Query, however, whether the way to do this is by arriving at a net sum, or by allowing a set-off or counter-claim. See Gareth Jones, 'Restitution: Unjust Enrichment as a Unifying Concept in Australia?', (1988) 1 *JCL* 8. For consideration of some of the measurement problems in American cases see H O Hunter, 'Measuring the Unjust Enrichment in a Restitution Case', (1989) 12 *Syd L R* 76.

26 (1951) 82 CLR 463.

27 [1951] 1 KB 551.

28 (1987) 162 CLR 221 at 241. The point is well taken that courts should not just run rough shod over a statute in order to reach what seems to be a 'just' result. For a consideration of this issue in the context of *Pavey and Matthews* see David Ibbetson, 'Implied Contracts and Restitution: History in the High Court of Australia', (1988) 8 *Oxford J Legal Stud* 312 at 326-7.

incapable of giving rise to a debt on which an action of debt or indebitatus assumpsit might be founded, and no claim for restitution was available. He also thought that to allow the appellant's claim would have been contrary to the plain words of that statute and could find nothing in the Queensland legislation to support a contrary view.

Contracts which Fail to Materialise

One of the 'growth areas' of contract law has been the invention of remedies to cope with the problems which arise when anticipated contracts fail to materialise. We have described this as an area of contract law because the courts view the problem as, at least in part, overcoming defects in the law of contract. Of course, the solutions are not contractual, but rather draw on estoppel, equity and restitution.[29] In relation to anticipated building contracts a common problem is that the builder has done work for which no contractual remedy is available. It is reasonably common, for example, for services to be rendered pursuant to letters of intent under planned construction or building contracts. At the least the builder will want to claim the expense of that work and restitution is now an acknowledged source of compensation in respect of such expenditure.

In essence the problem is a simple one: has the provider agreed to bear the risk that the contract will not be entered into? But, of course, the concept of risk is a slippery one and not itself a sufficient basis for deciding a legal issue which may involve the fate of an expenditure of millions of dollars. Thus, we can pose the question, 'In what circumstances will a quantum meruit be available to obtain restitution for such expenditure?' Notwithstanding the substantial developments which have occurred in this area it remains that a builder will not be permitted to recover simply because he or she has incurred expenses in the hope of obtaining a contract. Builders are still expected to bear costs of preparing quotations and tenders unless they have reached a contrary agreement enforceable as a contract. It is only when the builder's expenditure goes beyond normal expectations (having regard to the nature of the project anticipated) that the issue of recovery on a quantum meruit can arise.[30] Thus, in *William Lacey (Hounslow) Ltd v Davis*,[31] Barry J found that work was done not in the hope that the building contract might ultimately be awarded, but under the belief, generated by the other party, that the contract would be awarded. A contract might not be awarded because the project does not go ahead, and the question arises whether a person's discretion may, in effect, be fettered by the quantum meruit. In *Davis* Barry J held that a quantum meruit claim could be made because the defendant had led the builder to believe that the project would go ahead.[32]

---

29 The most significant of the recent cases is *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. See K C T Sutton, 'Contract by Estoppel', (1989) 1 *JCL* 205.

30 Compare *Turriff Construction Ltd v Regalia Knitting Mills Ltd* [1972] EG (Dig) 257 (letter of intent regarded as 'ancillary contract' for preparatory work).

31 [1957] 1 WLR 932.

32 It might be altogether more desirable to treat these cases as ones that involve detrimental reliance and seek to develop a more appropriate reliance based claim for recovery. See G Jones, 'Claims Arising Out of Anticipated Contracts Which Do Not Materialise', (1980) 18 *U W Ontario L R* 447.

Of the recent cases, we can start with *Sabemo Pty Ltd v North Sydney Municipal Council*,[33] where Sheppard J[34] stated the following principle:

> . . . where two parties proceed upon a joint assumption that a contract will be entered into between them, and one does work beneficial for the project, and thus in the interests of the two parties, which work he would not be expected, in other circumstances, to do gratuitously, he will be entitled to compensation or restitution, if the other party unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party.

In 1969 the Council advertised that it planned to build a civic centre, and to award a building lease for development of the land in question. Tenders were called for and Sabemo was the successful tenderer. The purpose of the tender process, it seems, was merely to bring the council into a negotiating relationship with the successful tenderer.

Sabemo prepared various schemes, at least one of which was satisfactory to all interested parties, but no contract was entered into even though development approval was given by the Council. Ultimately the Council decided to 'drop' the proposed scheme, and to work out a different scheme. Sabemo rendered an account of $426,000. However, the Council refused to pay and the action was brought to recover compensation or restitution. His Honour dealt solely with the issue of liability and held that the circumstance which in the instant case provided justification for holding the council liable was that, notwithstanding its own request that the work be done, the council deliberately decided to drop the proposal. Its unilateral decision, having nothing to do with the conduct of Sabemo or the quality of its work, could not deprive Sabemo of a right to payment. The position would (or at least might) have been different had the parties been unable to agree on a development scheme.

The decision in *British Steel Corp v Cleveland Bridge and Engineering Co Ltd*[35] illustrates that a quantum meruit may be available for work done under letters of intent. No contract arose because the parties were unable to agree on terms, but the work contemplated by the parties was done. In essence the problem was that BSC were not prepared to agree to the very onerous terms on CBE's standard form. It was clear that the work was not done gratuitously and Robert Goff J had little difficulty in saying that the work had to be paid for. It has been suggested[36] that this type of decision suffers from the criticism that it throws the risk of incomplete negotiations on only one of the parties. In *BSC*, the buyers would, had there been a contract, have obtained protection against late delivery. The answer, however, may be that the valuation can

---

33 [1977] 2 NSWLR 880. See J D Davies (1981) 1 *Oxford J Legal Stud* 300.

34 [1977] 2 NSWLR 880 at 902-3.

35 (1981) [1984] 1 All ER 504. See also *OTM Ltd v Hydranautics* [1981] 2 Lloyd's Rep 211. Contrast *Hooker Corp Ltd v Darling Harbour Authority* (unreported), Supreme Court of NSW, 30/10/87 (reversed on other grounds 20/9/88). Compare *Nepean District Tennis Association Inc v Penrith City Council* (unreported), Supreme Court of NSW, 24/10/88.

36 S N Ball, 'Work Carried Out in Pursuance of Letters of Intent—Contract or Restitution?', (1983) 99 *LQR* 572. Compare J Beatson, 'Benefit, Reliance and the Structure of Unjust Enrichment', [1987] *CLP* 71 at 85-6; Ewan McKendrick, 'The Battle of the Forms and the Law of Restitution', (1988) 8 *Oxford J Legal Stud* 197.

take into account at least some such considerations. Moreover, there will be no quantum meruit if it is clear that the reason why no contract was agreed was the conduct of the builder.

Ineffective Contracts

Introduction

The description 'ineffective contract' is not a precise one. It is being used here to encompass a range of defects, such as mistake, illegality, incapacity, failure to comply with a statutory requirement of writing and so on. Some of these defects lead to the conclusion that there is no contract at all, because it is void, for example because of uncertainty, others to the conclusion that the contract exists, but is unenforceable. The description is also sometimes used to describe contracts which have been rescinded or terminated. However, these situations are given separate treatment here.[37]

Void Contracts

In situations where the contract is void, say because it is incomplete or uncertain, a builder who has done work and thereby conferred benefits is in no worse position than where an anticipated contract fails to materialise, particularly if the work was done in the belief that there was a valid contract in existence. Absent some statutory provision, or illegality, work done must be paid for, in order to prevent unjust enrichment, because it was done at the request of the defendant. Indeed, it would not be unfair to say that the description 'void contract' is a contradiction. And its only value is to remind us of a background in which either or both the parties considered that there was a contract. Leaving aside any problems caused by illegality one would have thought that under the modern law there would not be much difficulty in allowing recovery.

The leading case, a classic one in the law of restitution, is *Craven-Ellis v Canons Ltd*[38] where the plaintiff claimed as on a quantum meruit for work done, as valuer and estate agent for the defendants. The contract was void, but the Court of Appeal held that the quantum meruit was available. Greer LJ said[39] that a promise to pay could be implied. It arose 'from the performance of the services and the implied acceptance of the same by the company'. He emphasised that the promise was not a factual inference, but rather an inference 'which a rule of law imposes on the parties where work has been done or goods have been delivered under what purports to be a binding contract, but is not so in fact'.[40] *Craven-Ellis* was followed by Monahan J in *Stinchcombe v Thomas*,[41] where the contract was held to be void for uncertainty. In *Way v Latilla*,[42] the contract was ineffective because it was incomplete, the parties having failed to agree on price. It was clear that there was no contractual right

37 See below, text at n 64 ff.
38 [1936] 2 KB 403.
39 [1936] 2 KB 403 at 409.
40 See also [1936] 2 KB 403 at 412.
41 [1957] VR 509. See also *Flett v Deniliquin Publishing Co Ltd* [1964–5] NSWR 383.
42 [1937] 3 All ER 759. See also *Flett v Deniliquin Publishing Co Ltd* [1964–5] NSWR 383. Compare *Monks v Poynice Pty Ltd* (1987) 8 NSWLR 662.

to payment for services rendered: there was no basis for implying a term to complete the contract. However, the House of Lords considered that there was an implied contract because the circumstances clearly indicated that the services were not intended to be gratuitous and most of the discussion is as to how the quantum meruit was to be quantified. The terms of the agreement, though incomplete, were admissible in evidence on this point. The same result was reached in *Peter Lind & Co Ltd v Mersey Docks and Harbour Board*[43] where a building contract was incomplete due to the parties' failure to agree on price.

Unenforceable Contracts

There are many more cases on restitution in the context of unenforceable contracts. Mainly these have been in the context of contracts which do not comply with requirements of writing derived from or analogous to those stated in the Statute of Frauds 1677 (Imp). There are, of course, other reasons for unenforceability and we have become familiar in recent years with many statutory regimes of registration of professional people and restrictions on contract forms, particularly in consumer contracts. Although many of these are directly analogous to the Statute of Frauds, others lie very much at the border between unenforceability simpliciter and unenforceability associated with illegality. This makes for an additional difficulty, namely a more serious element of public policy.

Mention must be made of policy because we are concerned with claims which might have been available as contractual actions but for the fact that the contract has been rendered unenforceable by statute. Clearly, if the legislature has thought it appropriate to deny the action on the contract we cannot infer a restitutionary right without paying some regard to the statutory policy. The Statute of Frauds stated its own policy objective, or at least its raison d'etre namely, fraudulent practices and perjury which had accompanied actions on simple contracts. Accordingly, six classes of contract—or promises—were subjected to a requirement of writing. The list, from dispositions of land to contracts in consideration of marriage seems to have no unifying element. Professor Simpson[44] has suggested as a unifying feature that prior to the statute those contracts would have been under seal and enforced by the action in covenant. The statute can then be seen as intended to substitute written evidence for deed. In this respect it was arguably a reaction against the growth of assumpsit where no particular form of evidence was required. It was, in other words, an attempt to control or restrict the new action. This may help to explain why it was never necessary for the contract to be in writing, written evidence was enough. And it might also be suggested that the intention was to control assumpsit rather than indebitatus assumpsit based on execution of the contract. Moreover, we know that the doctrine of part performance has always been a substantial gloss on the statute. The basic rationale of that doctrine is not too far removed from restitution. If there has been performance or acts recognising the contract to such a degree that it would be fraud—equitable fraud—to allow the statute to be pleaded, justice is done by enforcing the contract.[45]

---

43 [1972] 2 Lloyd's Rep 234.

44 A W B Simpson, *A History of the Common Law of Contract*, 1975, p 610.

45 Cf *Ash Properties Pty Ltd v Pollnow* (1987) 9 NSWLR 80 at 101 per Priestley JA.

Cases such as *Matthes v Carter*[46] illustrate that quantum meruit claims are frequently maintainable. Matthes sued on an indebitatus count to recover £900 for building work done, together with a sum of £93 for a few items of materials which he supplied. The District Court found that the contract between the parties was caught by s 54A of the Conveyancing Act 1919 (NSW). The Full Court said this was clearly correct. The District Court also held that the quantum meruit could be pursued. The Full Court said that the District Court Judge was wrong to hold that because the contract was unenforceable a quantum meruit was available. The position, it was said,[47] is that the express contract must be removed, either by rescission or for some other reason, because no contract can be implied while the express contract is extant, even if unenforceable. But, said the Full Court, the express contract will not be an obstacle where it has been discharged by performance. The action was described[48] as being 'for debt based upon the executed contract and not on an implied contract. It is money which in justice ought to be paid for services rendered, the proper ground for it being not in contract but in restitution'. However, this did not lead to success for the claim at issue because the whole work was not done. But a new trial was ordered restricted to the indebitatus count, to deal with two problems. First, there was an allegation that the claim was available because there had been an accepted repudiation. Secondly, the second part of the indebitatus claim had not been dealt with satisfactorily at the trial. Of course, a contract to do building work on land does not need to comply with the Statute of Frauds unless there is something in the contract which purports to confer an interest in the land. Even if the work is completed, the builder does not obtain any interest in the land unless conferred by the contract. For example the builders in *Pavey & Matthews Pty Ltd v Paul* could not lodge a caveat to prevent the land owner dealing with her property. But if there is a term in the contract which creates a charge over the land, in order to give the builder a caveatable interest, the contract must comply with s 54A.[49]

The views expressed in *Matthes v Carter* are consistent with two important earlier authorities, *Horton v Jones (No 1)*[50] and *Phillips v Ellinson Bros Pty Ltd.*[51] Both these cases also accept the proposition that we have seen in other areas, namely that the contract price may be referred to as evidence of the value of the services rendered. The judgement of Jordan CJ in *Horton v Jones* also appears to stand for the proposition that if a partial performance is freely accepted[52] the defendant will be obliged to pay even though the contract has not been fully performed. However, *Matthes v Carter* seems to proceed on the basis that only if the contract has been fully performed can the plaintiff recover.

In Queensland it has been suggested that there is no objection in allowing

---

46 (1955) 55 SR (NSW) 357.
47 (1955) 55 SR (NSW) 357 at 362.
48 (1955) 55 SR (NSW) 357 at 363.
49 See *Venios v Machon* (unreported), Supreme Court of NSW, 25/7/88.
50 (1934) 34 SR (NSW) 359.
51 *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221. See also *Gino D'Alessandro Constructions Pty Ltd v Powis* [1987] 2 Qd R 40.
52 See further on this concept below, text at n 74.

the quantum meruit in cases of substantial performance.[53] The rationale for such a view would be that the law of contract allows a builder to recover the contract price if he or she has substantially performed, and this should be translated into a quantum meruit claim when the contract is unenforceable. However, there may be a serious objection to such reasoning. A contractor is not discharged by substantial performance since, assuming that there is a breach, he or she remains liable to pay damages to the other party. Now if the contract is unenforceable by both parties the claim for damages is not available. It may be doubted whether the doctrine of substantial performance applies where there is no valid cross claim, counter-claim or right of set-off.[54] If the contract is unenforceable by the builder, as in *Pavey & Matthews Pty Ltd v Paul*, justice can be done, but is there a general rule against allowing the quantum meruit except in cases of full performance?

These cases are also part of a rather arid discussion about the views of Lord Denning. He wrote two articles on the quantum meruit.[55] They are referred to by the Full Court in *Matthes v Carter* and, as we have already seen,[56] have been very influential. But, as Denning LJ, he also expressed views in the Court of Appeal[57], views adopted by the High Court in *Turner v Bladin*.[58] Reference is made to both the Authorised Reports and the All England Law Reports because, in revising his judgment, he changed his position. Originally he said that if the plaintiff can show that he or she has fully performed, the action can be brought in debt and is available even though the contract is unenforceable by reason of the Statute of Frauds. But in the authorised version he stated that the action is for reasonable remuneration. The proper ground for the claim, he said, is not contract, but restitution. In *Pavey & Matthews Pty Ltd v Paul* the High Court, by majority, accepted the revised version. The majority therefore disagreed with the High Court's earlier opinion in *Turner v Bladin*. This means that earlier cases, which followed Lord Denning's original views, proceed on an erroneous view of the law. It is doubtful, however, whether this implies that a builder can recover on a partially performed building contract to which the Statute of Frauds applies. The position, it is suggested, is that the builder must be able to show that the contract has been discharged, either by full performance or by valid termination, for breach or repudiation or under the doctrine of frustration.[59]

According to the analysis in *Pavey & Matthews Pty Ltd v Paul*, the statutory prohibition falls to be constrated with cases such as *Deposit & Investment Co Ltd v Kaye*.[60] In that case the plaintiff, a licensed money-lender, was held

---

53 See *Gino D'Alessandro Constructions Pty Ltd v Powis* [1987] 2 Qd R 40 at 58. Compare *Fablo Pty Ltd v Bloore* [1983] 1 Qd R 107 at 112.

54 See J W Carter, *Breach of Contract*, 1984, para 694.

55 A T Denning, 'Quantum Meruit and the Statute of Frauds', (1925) 41 *LQR* 79 at 85; A T Denning, 'Quantum Meruit: The Case of *Craven-Ellis v Canosn Ltd*', (1939) 55 *LQR* 54.

56 Above, text at n 21.

57 *James v Thomas H Kent & Co Ltd*, [1951] 1 KB 551 at 556; [1950] 2 All ER 1099 at 1103–4.

58 (1951) 82 CLR 463.

59 *Gino D'Alessandro Constructions Pty Ltd v Powis* [1987] 2 Qd R 40 was a case of partial performance where, on one view, the builder accepted the other party's repudiation. The case was approved by the High Court in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

60 (1962) 63 SR (NSW) 453.

to be unable to recover on counts for money received or money paid because of failure to comply with the Money-lenders and Infants Loans Act 1941 (NSW). The plaintiff alleged that the contract had been repudiated and rescinded on that basis. The Full Court was prepared to assume that such rescission had occurred, and also that unjust enrichment is the basis for restitution in cases of money had and received and quantum meruit. Still, in the instant case the decision was adverse to the plaintiff. It was not 'against conscience' to quote Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[61] for the defendants to retain the money. It was, it should be noted, unnecessary to say that the contract was illegal.[62] On the other hand, Conolly J said, in *Williamson v Diab*[63] that non-compliance with s 54(5) of the Builder's Registration and Homeowners' Protection Act 1979 (Qld), which rendered the builder's contract illegal, would have precluded a quantum meruit claim even though the contract was executed.

Contracts Discharged for Breach

Introduction

An issue of restitution arises, we will assume, whenever a plaintiff has conferred a benefit on the defendant for which he or she will not be paid. The inquiry is whether a refusal to order restitution would result in unjust enrichment. In some cases it is suggested that restitution is available even though no benefit has been conferred. However, one would think that it is wrong to regard reliance expenditure as per se raising an issue of restitution.[64]

It is not hard to find the cause of problems of restitution in contract law. In lump sum building contracts full performance by the builder is usually regarded as a condition precedent to his or her right to recover the lump sum from the other party. The rule has its origin at a time when the courts were more concerned to answer the question 'whose turn first?' than with what we would regard as crucial, namely 'Is the performance in accordance with the contract?' There are two reasons for this. First, modern contracts state the order of performance, and if they do not we now know intuitively what the parties contemplate. Secondly, modern lawyers tend to answer the question by saying that it depends on whether there is a right to terminate the performance of the contract. For the modern contract lawyer, enforcement of the contract and termination are merely two sides of the one coin. Not so to the eighteenth century lawyers, because they did not regard termination as a necessary concept, due to the way in which contract issues were litigated. We do not have to go back into the history of the subject, but it is important to appreciate that the defects of the common law of contract in this area are traceable to the use of criteria which were originally devised to answer a different question.

The idea that performance must be 'full' or 'complete' necessarily promotes

---

61 [1943] AC 32 at 61.

62 Cf *Multo Pty Ltd v Craddock* (unreported), Supreme Court of NSW, 11/3/88 (Auctioneers and Agents Act 1941 (NSW)).

63 [1988] 1 Qd R 210.

64 Cf *Planché* v Colburn (1831) 8 Bing 14; 131 ER 305.

the question 'full or complete in what respect'? It is doubtful whether the common law ever subscribed to the response 'in every respect'. But, as might be expected in view of the history of the tort of negligence which, like contract, was conceived of as an action of the case, the misfeasance/nonfeasance distinction was influential. Thus, as a general rule a plaintiff would fail if his or her performance was not finished, whereas failure was not guaranteed if the defect was in the quality of the performance. This gave rise, however, to rather peculiar results. For example, if a carrier of goods agrees to deliver the goods at a named port but delivers the cargo to a port other than that named nothing can be recovered, because the contract is entire: *Metcalfe v Britannia Ironworks Co.*[65] Nevertheless, if less than the full cargo is delivered, recovery on a pro-rata basis is allowed: *Ritchie v Atkinson.*[66] And if the cargo arrives in a damaged state the full freight is recoverable, provided there has been 'substantial' performance: *Dakin v Oxley.*[67] No doubt some of this refinement—if that is the right word—was designed to prevent injustice, but it had no rational basis. However, the cases do indicate that the terminology of 'entire' *contracts* is inaccurate. It would be more correct to describe the relevant question as being whether the *obligation breached* was an entire one.[68]

The twentieth century cases evidence a more general attempt to alleviate the strictness of the common law of contract. It has been said that if performance is 'substantial' the plaintiff can recover on the contract, notwithstanding a breach on his or her part. Most of the cases have involved building contracts.[69] Decisions such as *Hoenig v Isaacs*[70] and *Bolton v Mahadeva*[71] stand for the proposition that, if the builder has substantially performed the contract, the contract price may be recovered subject to a set-off, counter-claim or cross claim for damages for breach of contract. It applies as well to 'severable' contracts, where the price is payable for designated parts or segments of performance, to be separately paid for.

There is, however, no genuine explanation for the doctrine of substantial performance. Its object may well be to prevent 'unjust' enrichment, but that is not the criterion for its application. In *Bolton v Mahadeva* the Court of Appeal decided that the contract was entire, but went on to consider whether there had been substantial performance, on the basis that if there was the plaintiff would have been able to recover the price stated in the contract. Yet, one would have thought that if the parties have agreed on complete performance, nothing less will do. Denning LJ's judgment in *Hoenig v Isaacs* takes this point, by saying that the doctrine operates only if the parties have not agreed that complete performance is required. This is not just an academic quibble. Denning LJ said that if complete performance is not required, the term stating this is a

---

65 (1977) 2 QBD 423.
66 (1808) 10 East 295; 103 ER 787.
67 (1864) 15 CBNS 646; 143 ER 938.
68 *Steele v Tardiani* (1946) 72 CLR 386.
69 For a discussion of the origin and basis of the doctrine in this area see S J Stoljar, 'Substantial Performance in Building and Work Contracts', (1954–6) 3 *WALR* 293.
70 [1952] 2 All ER 176.
71 [1862] 1 WLR 1009.

condition for the breach of which the other party may terminate the contract.[72]

Claims by Parties in Breach

The classic case on partially executed contracts is *Sumpter v Hedges*[73] The plaintiff agreed to build two houses and stables for the defendant for £565. Work with a value of £333 was done, and part of the price was paid. The builder then abandoned the contract as he had run out of money. The defendant finished the buildings himself, using certain loose building materials left behind. Judgment was given for the defendant in an action for work done and materials supplied. However, there was an order in the plaintiff's favour in respect of the loose materials used. An appeal to the Court of Appeal was dismissed. The court stated the (now) traditional rationalisation, namely that no 'fresh contract' to pay could be implied when the work was abandoned. This has been treated as an analysis in terms of opportunity to reject the benefit of the work. Because the defendant had no choice whether to accept or reject the partially completed buildings he did not have to pay for the benefit conferred. However, he enjoyed such a choice in relation to the loose materials and therefore had to pay for them. Recently, Andrew Burrows[74] has challenged this analysis of *Sumpter* and suggested that the concept of acceptance of benefit is not the key. It might seem that the decisions are manifestly the source of injustice, and indicative that 'unjust enrichment' is not a genuine explanation of restitution. But the argument is that the enrichment is not unjust unless the recipient has the choice whether to accept the benefit or not.[75] If Burrows is right, the concept of unjust enrichment should not be dismissed on such a basis.

The decision of the High Court in *Steele v Tardiani*[76] is instructive, and a rare illustration of success by a party in breach. Steele employed the plaintiffs, who were released Italian internees during the second world war, to cut timber. Their performance was not in accordance with the contract, since they did not comply with a term specifying the dimensions of the timber. Moreover, their performance was not substantial. But they did cut 1500 tons of timber. The trial judge held that Steele was obliged to pay 'a fair estimate' of the value of the timber not of the correct dimensions but nevertheless accepted. The High Court held, first, that the contract was not an 'entire' contract. Rather it was 'infinitely divisible'[77] with the contract price indicating the rate at which the cut timber was to be paid for. That did not help the plaintiffs very much because, as Dixon J said,[78] 'each divisible application of the contract is entire and is only satisfied by performance, not partial, but substantially complete'.

---

72 The loose response of many American cases, and even one might say of the Uniform Commercial Code, is that the parties do not mean literally what they say, and, therefore, the courts may impose 'reasonable' undertandings in the circumstances. See, eg, *Aesco Steel Inc v J A Jones Constr Co*, 621 F Supp 1576 (E D La 1985) and see also Note, 'Commercial Law and the American *Volk*: A Note on Llewellyn's German Sources for the Uniform Commercial Code,' (1987) 97 *Yale L J* 156.

73 [1898] 1 QB 673.

74 A S Burrows, 'Free Acceptance and the Law of Restitution', (1988) 104 *LQR* 576.

75 See also *Summers v The Commonwealth* (1918) 25 CLR 144 (aff'd (1919) 26 CLR 180).

76 (1946) 72 CLR 386.

77 (1946) 72 CLR 386 at 401 per Dixon J.

78 (1946) 72 CLR 386 at 401.

Clearly, in respect of timber not of the correct dimensions recovery on the contract was not possible. Secondly, in order to recover in respect of such timber the plaintiff had to show 'circumstances removing their right to remuneration from the exact conditions of the special contract'.[79] This was Dixon J's expression of the way of avoiding the rule applied in *Sumpter v Hedges*. Thirdly, it is 'not enough that work has been beneficial',[80] in this case by turning standing timber into valuable firewood. The evidence had to be examined to see the circumstances under which Steele obtained the benefit. The evidence showed that the point as to dimensions had only been taken late in the day (during cross-examination), and that he had stood by while the timber was cut and made no complaint, thereby allowing the plaintiffs to leave their employment under the impression that he was not insisting on the contract. Fourthly, in these circumstances the subsequent sale of the timber could be regarded as 'a taking of the benefit of the work and so, as involving either a dispensation from precise performance or an implication at law of a new obligation to pay the value of the work done'.[81] Generally, however, the courts have been very willing to reject the argument that the defendant, in keeping his or her own property, has accepted a benefit.[82]

Claims by Innocent Parties

A claim for restitution may arise if the innocent party has fully or partially performed. Two questions then arise. First, must the performance be received by the other party in the sense of constituting an addition to the defendant's property or assets? Secondly, should the plaintiff be permitted to choose between restitution and damages? We can put to one side cases in which the plaintiff has fully performed prior to termination. Unless the contract was for some reason ineffective there is no need to justify the action for the price, assuming that the time for performance has arrived. The quantum meruit is contractual in character, and this is true even if the parties agreed that a reasonable price would be paid. Only if the plaintiff seeks to ignore a price fixed by the contract can an issue of restitution arise.

The decision in *Ettridge v Vermin Board of the District of Murat Bay*[83] provides a nice contrast with *Sumpter v Hedges*. The plaintiff agreed to erect a fence for £37 per mile. The defendant defaulted in his obligation to supply materials, but the plaintiff, for a time, continued to perform. Eventually, after more disputes, he abandoned the contract. The Full Court held, on the assumption that the defendant has repudiated the contract, that the plaintiff could recover damages or restitution on a quantum meruit by accepting the repudiation.[84]

The right of election referred to in *Ettridge* goes back a long way, but perhaps its origin in the modern cases is *De Bernardy v Harding*.[85] It was there said

---

79 (1946) 72 CLR 386 at 402.
80 (1947) 72 CLR 386 at 402 per Dixon J.
81 (1946) 72 CLR 386 at 405 per Dixon J.
82 See, eg *Cooper v Australian Electric Co (1922) Ltd* (1922) 25 WALR 66; *Forman & Co Pty Ltd v The Ship 'Liddesdsale'* [1900] AC 190.
83 [1928] SASR 124.
84 See further [1930] SASR 210 at 215.
85 (1853) 8 Ex 822; 155 ER 1586.

that the plaintiff could recover on a quantum meruit for work and labour when the defendant repudiated a contract under which the plaintiff was to sell tickets to see the funeral procession of the Duke of Wellington. Alderson B said that after the defendant's repudiation the plaintiff could either sue on the contract—for damages—or recover on a quantum meruit for work done, relying on a rescission of the contract. A modern illustration is *Stevenson v Hook*,[86] where a surveyor recovered the value of work done after a repudiation by the defendant.

Many of the older cases, such as *De Bernardy* itself, use the word 'rescission' to describe termination. This is still true today, even though we now know, from cases such as *McDonald v Dennys Lascelles Ltd*[87] and *Johnson v Agnew*,[88] that 'rescission' ab initio is quite different from termination. So, we would see the choice as between (1) affirming the contract and suing for damages; (2) terminating the performance of the contract and claiming damages; and (3) terminating and claiming restitution. For restitution after breach rescission ab initio is neither necessary nor available. However, it seems fairly clear that in the older cases this was the type of rescission referred to. And this is true even in the modern cases, such as *Brooks Robinson Pty Ltd v Rothfield*.[89] The plaintiff agreed to build a cocktail cabinet in the defendant's house and the defendant repudiated the contract after the cabinet was partially completed. The plaintiff sued to recover £91 for work done and materials supplied. The Victorian Full Court decided that the plaintiff had rescinded the contract and was entitled to recover on a quantum meruit without regard to the terms of the contract agreed. The case raises the question: 'Is the contract price, or rather a proportion of it, the measure of recovery?'[90]

At various times there have been suggestions for reform of this area. In 1983 the Law Commission recommended,[91] by majority,[92] that a new remedy be available when the contract has been discharged but the builder has no remedy at common law. The details of the proposal need not be considered. They have met with a considerable amount of criticism.[93] The Law Reform Committee of South Australia[94] has suggested a different type of reform. It thought the English model too complex and proposed a right of restitution for the partial performer, but subject to an 'unfettered discretion in the Court to refuse to order payment or to reduce the amount of the payment if it thinks just'.[95] Most restitution lawyers would prefer to work out a solution based on general principles such as unjust enrichment and total failure of consideration than accept such an unfettered discretion.

---

86 (1853) 8 Ex 822; 155 ER 1586.
87 (1933) 48 CLR 457.
88 [1980] AC 367.
89 [1951] VLR 405.
90 See Part II of this article.
91 *Pecuniary Restitution on Breach of Contract* (Law Commission No 121).
92 Brian Davenport QC could see no justification for the reform, pointing out that the main beneficiaries would be builders undertaking small jobs. In his view it would be wrong to take away from the ordinary householder the only real remedy for protection against the builder not completing the work, namely, withholding the final payment.
93 See A S Burrows, (1984) 47 *MLR* 76; J W Carter, *Breach of Contract*, 1984, paras 694–5.
94 Nineteenth Report, 1986.
95 Nineteenth Report, p 21.

Frustration

One would have thought that, given the neutrality of frustration, that is the fact that it arises independently of breach, a greater willingness would have been shown towards the allowance of restitutionary claims. In fact that has not proved to be the case. Ever since *Cutter v Powell*[96] the courts, mainly under the influence of the implied contract theory, have refused to allow quantum meruit claims for benefits conferred prior to frustration. *Cutter* was an employment contract case. The leading case on building contracts is *Appleby v Myers*.[97] The plaintiffs agreed to build and install 10 items of plant and machinery. After some were installed the defendant's premises burnt down and the contract was thereby frustrated. The plaintiffs' action to recover £419 for work done and materials supplied failed. The risk of loss by frustration lay where it fell, the court said there was no basis for implying a fresh contract. The decision has been approved in Australia.[98] In *Appleby* frustration destroyed the work done, there was no benefit remaining after frustration. It is therefore arguable that there was no basis for restitution anyway. The position may have been remedied by statute.[99]

The only situation where, it seems, the common law will countenance a claim on a quantum meruit after frustration is where work is done after the contract is frustrated. Thus, in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[100] the High Court saw no objection to the contractors claiming a quantum meruit for work done after the construction contract was frustrated. In that case the contractors agreed to excavate the tunnels for the Eastern Suburbs Railway. The contract was frustrated when local residents obtained an injunction which had the effect of delaying the work. The contractors could not carry out blasting operations in the way contemplated by the contract, but the contract did not confer any right to remuneration for their increased costs. Because the work was done after frustration a quantum meruit was available.

Perhaps we can now, after *Pavey & Matthews Pty Ltd v Paul*, argue in favour of a second type of restitutionary claim, in respect of work done prior to frustration which remains, at least in part, of benefit to the defendant after frustration.[101] Given the reasoning in *Pavey*, the only requirement, apart from the need for benefit, is an element of injustice. The traditional way of showing this would be through free acceptance by the defendant. This requirement is by no means necessarily satisfied. The problem which the builder will face is that the work will have been done on the defendant's land. There will,

---

96 (1795) 6 TR 320; 101 ER 573. See S J Stoljar, 'The Great Case of Cutter v Powell', (1956) 34 *Can B Rev* 288.

97 (1867) LR 2 CP 651.

98 See, eg *Re Continental C & G Rubber Pty Ltd* (1919) 27 CLR 194 at 201.

99 It depends on how the frustration statutes will be interpreted. In NSW the Frustrated Contracts Act 1978 (NSW) seems to allow recovery of some remuneration. That is not, it seems, the position in England under the Law Reform (Frustrated Contracts) Act 1943 (UK). See *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 801 (aff'd without reference to the point [1981] 1 WLR 232; [1983] 2 AC 352). Cf Frustrated Contracts Act 1988 (SA), ss 3(3), (4), 7.

100 (1982) 149 CLR 337.

101 Compare *Société Franco Tunisienne D'Armement v Sidermar SpA* [1961] 2 QB 278 at 312–15 (charterparty) (subsequently overruled on the basis that the contract was not frustrated).

in most cases, be a very strong argument that the defendant really had no choice but to accept the benefit conferred. Perhaps the best chance of success arises where the defendant asks for the work to be completed, but even here the builder would be well advised to ask for a new contract which provides for payment in respect of work already done.

Conclusion

What can we say by way of conclusion? Clearly we have not reached the end of the story by any means. The future of quantum meruit claims in building contracts and, indeed, the law of restitution generally depends on two main factors. First, the extent to which the courts are prepared to develop the concept of unjust enrichment. Secondly, whether the legislature will continue to impose solutions, as has been done in the context of frustration and as is threatened in the context of partially performed discharged contracts, where breach led to discharge.

It is believed that the courts are perfectly capable of developing the law in a satisfactory way. *Pavey & Matthews Pty Ltd v Paul* disposes of the need for an historical analysis. That is not to say that the problem does not remain a challenging one. The situations we have examined are difficult ones, lying at the borderland between contract and restitution. The courts must tread carefully, as there is always the danger of imposing solutions which the parties never contemplated.